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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

POARCH BAND OF CREEK INDIANS,
Cross-Petitioner,

v.

STATE OF ALABAMA and
JAMES E. FOLSOM, Governor, State of Alabama,
Cross-Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Congress, in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7), expressly provided for suits by Indian tribes against states to enforce the Act's requirement of good faith negotiations regarding Class III gaming. Does Congress have the power to authorize such suits, consistent with the Eleventh Amendment?

2. The doctrine of *Ex parte Young* authorizes suits in federal court against state officials for prospective relief to enjoin violations of federal law. Does the doctrine of *Ex parte Young* permit suit against a state governor to require good faith negotiations with an Indian tribe, as required by the Indian Gaming Regulatory Act?

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CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion and judgment of the Eleventh Circuit is reported at 11 F.3d 1016 (11th Cir. 1994), and is reprinted in the Appendix to the State of Alabama's Petition for a Writ of Certiorari in No. 94-35 ("Al.App.") at A1-A69. Alabama's petition for rehearing in the Eleventh Circuit was denied on April 6, 1994. Al.App. at E1-E5.

The orders of the United States District Court for the Southern District of Alabama dismissing the action are reported at 776 F. Supp. 550 (S.D.Ala. 1991), Al.App. at B1-B70 and 784 F. Supp. 1549 (S.D. Ala. 1992), Al.App. at D1-D23.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on January 18, 1994. Al.App. at A1. Alabama's petition for rehearing was denied on April 6, 1994. Al.App. at E1-E5. Alabama's petition for a writ of certiorari was filed and received on July 1, 1994. This cross-petition is filed, in accordance with Rule 12.3 of this Court, within 30 days after receipt of Alabama's petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Eleventh Amendment to the U.S. Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTES

25 U.S.C. § 2710(d)(7):

> (A) The United States district courts shall have jurisdiction over—
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . . .
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the

close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

25 U.S.C. § 2710(d) is reprinted in Al.App. at G1-G18.

STATEMENT UNDER RULE 29.4(b)

In accordance with Rule 29.4(b) of this Court, this cross-petition is being served on the Solicitor General of the United States because 28 U.S.C. § 2403(a) may be applicable, as the constitutionality of certain provisions of the Indian Gaming Regulatory Act [1] may be drawn in question.

STATEMENT OF THE CASE

This is an action by the Poarch Band of Creek Indians ("Tribe"),[2] a federally recognized Indian tribe, against the State of Alabama and its Governor, to secure compliance with the requirement of the Indian Gaming Regulatory Act ("IGRA") that they negotiate with the Tribe "in good faith" regarding a tribal-state compact to govern Class III gaming. 25 U.S.C. § 2710(d)(7)(A)(i).

Enacted in 1988, IGRA establishes a comprehensive federal regulatory framework for Indian gaming. The Act divides gaming into three categories.[3] Class III gam-

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[1] Pub. L. No. 100-497, 102 Stat. 2467, codified at 25 U.S.C. §§ 2701 *et seq.*

[2] "Poarch Band of Creek Indians" is the Tribe's official name, and the sole name under which the complaint and all pleadings were filed for the Tribe. For reasons unknown to the Tribe, the Eleventh Circuit used the additional name "Poarch Creek Indians" in its case caption, which has been carried over into the caption of the petition in No. 94-35. In this cross-petition, we use the Tribe's proper name, "Poarch Band of Creek Indians."

[3] Class I gaming includes traditional forms of Indian gaming such as "social games solely for prizes of minimal value . . . ." 25 U.S.C. § 2703(6). Class II gaming includes bingo, and related games such as pull-tabs, punch boards, lotto, tip jars, instant bingo

ing—the most significant class economically—is permissible if, *inter alia*, it is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 U.S.C. § 2710(d)(1)(C).

While the compact requirement provides a role for states with regard to Indian gaming, Congress in enacting IGRA remained concerned that states not abuse the compacting process and either unreasonably refuse to enter compact negotiations or unreasonably refuse to agree to compact terms. S.Rep. No. 446, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 ("[i]t is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming . . . ."). Accordingly, Congress provided that if a state fails to negotiate in good faith, the federal district courts shall have jurisdiction over

> any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.

25 U.S.C. § 2710(d)(7)(A)(i).

In July 1990, the Poarch Band of Creek Indians requested the Governor of Alabama to commence negotiations regarding a compact for Class III gaming. Those negotiations failed to achieve a compact. In September 1991, the Tribe filed this action, as provided in IGRA.[4]

The District Court granted the State's motion to dismiss on Eleventh Amendment grounds. *Poarch Band of*

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and "other games similar to bingo . . . ." 25 U.S.C. § 2703(7)(A). Class III gaming is all gaming not Class I or Class II. 25 U.S.C. § 2703(8).

[4] The gravamen of the complaint was that, by not negotiating with regard to certain forms of gaming that the Tribe claimed were permitted by the State, the defendants failed to comply with IGRA's obligation that they negotiate in good faith.

Creek Indians v. Alabama, 776 F. Supp. 550, 551, 553-563 (S.D.Ala. 1991), Al.App. at B1-B2, B9-B66. In a separate order, the District Court dismissed the Governor, rejecting the Tribe's argument that the action could proceed against the Governor under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Poarch Band of Creek Indians v. Alabama*, 784 F. Supp. 1549, 1550-52 (S.D.Ala. 1992), Al.App. at D1-D2, D4-D17.

The Tribe appealed both orders. The Eleventh Circuit consolidated the appeal with *Seminole Tribe of Florida v. Florida*, No. 92-4652, and the two cases were argued and decided together. The Eleventh Circuit held that Congress, in enacting IGRA, intended states to be subject to actions by tribes regarding good faith negotiations. *Seminole Tribe*, 11 F.3d at 1024, Al.App. at A33-A40. Nevertheless, the Eleventh Circuit concluded that Congress lacks the power to abrogate the states' Eleventh Amendment immunity when it acts under the Indian Commerce Clause, the power under which it enacted IGRA. *Id.* at 1019, 1026-28, Al.App. at A3-A4, A47-A61. The Eleventh Circuit also rejected application of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), finding that negotiations under IGRA are discretionary, and that the actions by the tribes under IGRA are really against the states. *Id.* at 1028-29, Al.App. at A61-A66.

The Eleventh Circuit also noted that, as a result of its ruling, the portions of IGRA addressing the jurisdiction of the federal courts in connection with good faith actions against states are rendered inapplicable, absent state consent. *Id.* at 1029, Al.App. at A66. Rather than declaring IGRA's complete statutory framework regarding Class III gaming invalid, the Eleventh Circuit suggested that in the circumstances of this case—where Class III gaming negotiations are unsuccessful and a state successfully interposes an Eleventh Amendment defense to a good faith action by a tribe—IGRA authorizes the tribe to seek, and the Secretary of Interior to prescribe, regula-

tions for Class III gaming. *Id.* at 1029, Al.App. at A67-A69.

Alabama filed a petition for rehearing with regard to the Eleventh Circuit's language on Secretarial authority. Alabama's petition for rehearing was denied, with no judge voting to grant the petition. Al.App. at E1-E5.

The judgment of the Eleventh Circuit thus affirmed dismissal of this action on Eleventh Amendment grounds, as sought by the State. Although the judgment was in its favor, Alabama filed a petition for writ of certiorari on July 1, 1994. *State of Alabama v. Poarch Creek Indians*, No. 94-35. Alabama's petition seeks review of the language in the Eleventh Circuit's opinion regarding Secretarial authority to prescribe Class III gaming procedures —language the Secretary has not implemented.

This cross-petition seeks review of the judgment of the Eleventh Circuit—which held that this action by the Tribe, seeking to enjoin continued non-compliance with IGRA's requirement of good faith negotiations, is barred by the Eleventh Amendment.[5]

Before discussing reasons for granting this cross-petition, we call to the Court's attention that Congress is considering legislation that may obviate the need for this Court to address these issues. Congress has pending before it a comprehensive revision of IGRA that, among other things, would fundamentally alter the framework under which tribes could undertake Class III gaming.

The Indian Gaming Regulatory Act Amendments Act of 1994, S. 2230, was introduced in the Senate on June 23, 1994. S. 2230, 103rd Cong., 2d Sess. (1994); *see* 140 Cong. Rec. S7561 (daily ed. June 23, 1994) (remarks

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[5] The petition in No. 94-12, *Seminole Tribe of Florida v. Florida*, seeks review of the same judgment and opinion of the Eleventh Circuit and raises essentially identical issues to those in this cross-petition. Accordingly, if the Court grants the petition in No. 94-12, it should likewise grant the cross-petition here.

of Senator Inouye). This measure, sponsored by Senator Inouye (D-Hawaii), Chairman of the Senate Indian Affairs Committee, and Senator McCain (R-Ariz.), Vice-Chairman of that Committee, follows from a year-long series of negotiations between the states, represented by the Governors and Attorneys General, and the tribes regarding how to address through legislation significant issues that have arisen under IGRA.[6] Among other things, S. 2230 would establish a new process for tribes to enter compacts permitting Class III gaming. This new process is intended to remedy the issues related to Eleventh Amendment immunity that have arisen in cases like this one.

Currently, under IGRA a compact with a state is a major precondition for a tribe to conduct Class III gaming. 25 U.S.C. § 2710(d)(1)(C). If compact negotiations between a tribe and state fail, the remedy is for the tribe to sue the state in federal court, alleging a failure of the state "to conduct such negotiations in good faith . . . ." 25 U.S.C. § 2710(d)(7)(A)(i). This remedy has been thwarted, in actions like this one, by states invoking as a defense their immunity under the Eleventh Amendment.

S. 2230, however, dispenses with the "good faith" lawsuit as part of the IGRA scheme. As an initial matter, under S. 2230, a tribe seeking to undertake Class III gaming would notify the Secretary of the Interior. S. 2230, section 10(a)(3)(A)(i). Notice would also be provided to the state. S. 2230, section 10(a)(3)(B)(i). The terms of a Class III gaming compact would be negotiated between the tribe and the Secretary, unless the state affirmatively requested to be the negotiating party.

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[6] 140 Cong. Rec. S7561 (daily ed. June 23, 1994) (remarks of Senator Inouye) ("a substantial portion of the measure we introduce reflects the work of State and tribal representatives that has been produced over countless hours and days of negotiations that began in earnest the week of July 12, 1993").

S. 2230, section 10(a)(3)(A)(i)-(iv) and (B)(iii)-(iv). Such a request by a state "shall be deemed to constitute a voluntary waiver of the sovereign immunity of the State for the purposes of this Act." S. 2230, section 10(a)(3)(B)(iv).

In other words, under S. 2230, state participation in the process leading to tribal Class III gaming would be at the state's option, and such participation would be deemed to be a voluntary waiver of immunity, pursuant to the terms of the bill. A state not wishing to have its immunity waived would be free to take no part—to leave the matter of gaming regulation to the federal government and the tribe, as is typically the case in the conduct of Indian affairs. In short, if S. 2230 is enacted, judicial resolution of the questions presented here may not be necessary.[7] Senator Inouye has expressed his intent to move forward quickly with the legislation, *see* 140 Cong. Rec. S7562 (daily ed. June 23, 1994) (remarks of Senator Inouye), and the Senate Indian Affairs Committee held hearings on the measure on July 19 and July 25, 1994.

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[7] Enactment of S. 2230 would also moot the issues raised in Alabama's petition in No. 94-35. The State seeks review of the language in the Court of Appeals' opinion that indicates that the Secretary has the authority, in the circumstances of this case, to issue Class III gaming regulations for the Tribe. Pet. at 9-29. Enactment of S. 2230 would vitiate the need for resolving that issue as well. Under the framework established by S. 2230, the Secretary would negotiate compacts with tribes as an initial matter. S. 2230, section 10(a)(3)(A). His authority to do so in the circumstances raised here—where a state successfully invokes the Eleventh Amendment in a tribal action concerning "good faith"—would no longer be an issue.

REASONS FOR GRANTING THE WRIT

This cross-petition presents questions regarding the Eleventh Amendment that have not been addressed by this Court, as to which there is a conflict in the Circuits. Unless the Court determines that, for prudential reasons, it will defer action to permit Congress time to complete its reconsideration of this matter (as described in the Statement of the Case above), the cross-petition should be granted for the following reasons.

I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS

The Eleventh Circuit held that while Congress clearly intended in IGRA to abrogate the states' Eleventh Amendment immunity from suit, it lacked the power to do so. *Seminole Tribe*, 11 F.3d at 1019, 1024-28, Al.App. at A3-A4, A36-A61. As recently summarized by the Ninth Circuit, the Courts of Appeals are in conflict on this issue:

> The dispositive issue in this appeal and cross-appeal is whether the state is immune from this suit under the Eleventh Amendment despite the fact that Congress, acting pursuant to its plenary constitutional power to regulate Indian affairs, clearly intended to authorize such suits. There is an existing circuit conflict on this issue. The Eighth Circuit has held that states are not immune, Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993), while the Eleventh Circuit has held that they are. Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994) . . . . We reverse, holding that the state is not immune from suit . . . .

Spokane Tribe of Indians v. Washington, No. 92-35113, No. 92-35446, 1994 U.S. App. LEXIS 16566, at *1-2 (9th Cir. July 6, 1994). Thus, the Eleventh Circuit's decision is directly at odds with decisions of the Eighth

and Ninth Circuits. Additional cases raising the same issue are pending before the Tenth Circuit.[8] Certiorari should be granted to resolve the conflict.

II. THE DECISION OF THE ELEVENTH CIRCUIT RAISES IMPORTANT ISSUES OF FEDERAL LAW THAT HAVE NOT BEEN ADDRESSED BY THIS COURT

This Court has upheld Congressional authority to abrogate state Eleventh Amendment immunity under section 5 of the Fourteenth Amendment, and under the Commerce Clause. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989). But, the Court "has never addressed the intersection of federal power over tribes and state sovereign immunity that the IGRA represents." *Spokane Tribe*, 1994 U.S. App. LEXIS 16566, at *11.

The Courts of Appeals have found *Union Gas* to be the "case most relevant" to the issue of Congress' power to abrogate state Eleventh Amendment immunity under IGRA. *Seminole Tribe*, 11 F.3d at 1026, Al.App. at A47; *see also Spokane Tribe*, 1994 U.S. App. LEXIS 16566, at *13. In *Union Gas*, the plurality reaffirmed the principle set forth in *Fitzpatrick*:

> When Congress acts pursuant to § 5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

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[8] *Kickapoo Tribe of Indians v. Kansas*, No. 93-3110 (10th Cir. argued Nov. 8, 1993); *Ponca Tribe of Oklahoma v. Oklahoma*, No. 92-6331 (10th Cir. argued Nov. 8, 1993); *Pueblo of Sandia v. New Mexico*, No. 93-2018 (10th Cir. argued Nov. 8, 1993); *Apache Tribe of the Mescalero Reservation v. New Mexico*, No. 93-2020 (10th Cir. argued Nov. 8, 1993).

Union Gas, 491 U.S. at 16 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. at 456). The plurality in *Union Gas* expressly applied this rationale, concluding that since the Commerce Clause "withholds power from the States at the same time as it confers it on Congress," Congress has authority to abrogate state Eleventh Amendment immunity when acting under the Commerce Clause. *Id.* at 19.

The Eleventh Circuit, however, rejected application of the *Union Gas* rationale, on the ground that *Union Gas* arose under the Interstate Commerce Clause, while IGRA, in the Court's view, was enacted under the Indian Commerce Clause. *Seminole Tribe*, 11 F.3d at 1027, Al.App. at A53-A58. Noting merely that "the different purposes underlying the two clauses mandate that they be treated distinctly," the Eleventh Circuit declined to analyze the impact such differences may have on Congressional power to abrogate Eleventh Amendment immunity. *Id.*, Al.App. at A58.[9]

In contrast, the Ninth Circuit in *Spokane* specifically applied the rationale of the *Union Gas* plurality and the *Fitzpatrick* majority, holding

> In this case, as in Union Gas and Fitzpatrick, Congress is acting under one of its plenary powers. As the Supreme Court explained in Cotton Petroleum, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. In 1832, the Supreme Court pronounced that the Indian Commerce Clause, together with Congress' constitutional power to conclude treaties with Indian tribes, provide Congress with "all that is required" for complete

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[9] The Eleventh Circuit also stated that, even if it was inclined to apply the rationale from *Union Gas*, it would hold that Congress lacked power to abrogate state Eleventh Amendment immunity by enacting IGRA because the activity involved is not "a typically private activity." *Id.* at 1028, Al.App. at A59-A61. No case of this Court—and no lower court considering the issue presented here—supports such a formulation.

> control over Indan affairs. Worcester v. Georgia, 31 U.S. 515, 558, 8 L.Ed. 483 (1832).
>
> * * * *
>
> Congressional power pursuant to the Indian Commerce Clause, then, cannot be less than its authority under the Interstate Commerce Clause.

Spokane Tribe of Indians, 1994 U.S. App. LEXIS 16566, at *16-18. The Ninth Circuit accordingly upheld Congressional authority to abrogate state Eleventh Amendment immunity through IGRA. *Id.* at *20-21.

Review by this Court is needed to resolve whether Congressional power to abrogate states' Eleventh Amendment immunity through IGRA is supported by the plenary nature of the Indian Commerce Clause—a position endorsed, correctly in our view, by the Ninth Circuit, and rejected by the Eleventh Circuit.

III. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH EX PARTE YOUNG, 209 U.S. 123 (1908)

Both *Union Gas* and *Fitzpatrick* involved the core issue of state Eleventh Amendment immunity—claims for money damages against states. In contrast, in this case, the Tribe seeks only prospective injunctive relief, to require the Governor to comply with the statutory requirement to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A)(i) and (iii). Accordingly, the Tribe's suit against the Governor here is permissible under *Ex parte Young*, 209 U.S. 123 (1908).

The doctrine of *Ex parte Young* authorizes actions against state officials to prohibit continued violation of federal law. As this Court has noted:

> Ex Parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a

> statute claimed to violate the Fourteenth Amendment . . . . But the relief awarded in Ex Parte Young was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment.

Edelman v. Jordan, 415 U.S. 651, 664 (1974). The distinction between prospective injunctive relief against state officials, which is permissible, and retroactive relief including money damages, which is barred by the Eleventh Amendment, is at the heart of the doctrine. *Id.* at 664-71.

Here, the Tribe seeks an order requiring the Governor to stop violating IGRA's directive regarding good faith negotiations. Nothing in this action seeks retroactive relief. Nor, contrary to the Eleventh Circuit's ruling, does the Tribe seek to compel the exercise of discretion by the Governor. *Seminole Tribe*, 11 F.3d at 1028-29, Al.App. at A61-A64. The statutory duty to negotiate in good faith is not discretionary. 25 U.S.C. § 2710(d)(3)(A). And, the Governor, as the official who in fact conducted compact negotiations with the Tribe, is an appropriate defendant.

The Court should grant certiorari to clarify that IGRA does not render unavailable the relief this Court has upheld under the doctrine of *Ex parte Young*—prospective injunctive relief to compel a state official to comply with federal law.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

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